

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33760

FLAVIO GARCIA ROJAS,)	2008 Unpublished Opinion No. 530
)	
Petitioner-Appellant,)	Filed: July 3, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla Williamson, District Judge.

Order dismissing application for post-conviction relief, affirmed.

Dennis J. Sallaz of Sallaz & Gatewood, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Flavio Garcia Rojas appeals from the district court's order dismissing his post-conviction application after an evidentiary hearing. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

After a jury trial, Rojas was found guilty of sexual abuse of a child under the age of sixteen years and lewd conduct with a minor under the age of sixteen years.¹ The conduct for which Rojas was found guilty occurred between May 2001 and April 2003. The victim was Rojas's girlfriend's daughter. Based on Rojas's conduct, Rojas's girlfriend (Juarez)--the victim's mother--was charged with failing to report child abuse within twenty-four hours of the discovery of such conditions.

¹ Rojas has not augmented the record on appeal with his trial court record.

Rojas and Juarez were both represented by the same privately-hired trial attorney. Prior to Rojas's trial, Juarez expressed to her attorney that she wanted to testify in Rojas's trial about instances of her daughter's (the victim's) dishonesty. The attorney advised Juarez not to testify in Rojas's case. Juarez's trial took place after Rojas's, and she was also found guilty.

Rojas filed a post-conviction application containing numerous claims and requested counsel. Post-conviction counsel was appointed, and the district court held an evidentiary hearing on Rojas's application at which Rojas, Juarez, and their trial attorney all testified. At the evidentiary hearing, Rojas elicited testimony that he alleged supported a claim of ineffective assistance of counsel based on his trial attorney's conflict of interest resulting from the dual representation of Rojas and Juarez. The district court did not specifically address Rojas's conflict of interest claim, but dismissed his post-conviction application. Rojas appeals, asserting only a claim that he was denied effective assistance of counsel based on a conflict of interest.

II.

STANDARD OF REVIEW

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an

evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

III. ANALYSIS

Rojas asserts that he was denied his Sixth Amendment right to effective assistance of counsel when his trial attorney labored under an actual conflict of interest based on his attorney's joint representation of Rojas and Juarez. The state responds that Rojas failed to meet his burden of demonstrating that there was an actual conflict of interest and failed to demonstrate that any conflict actually affected the adequacy of his representation.

The right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Powell v. Alabama*, 287 U.S. 45, 66-68 (1932). This right has been accorded not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). It follows from this that assistance, which is ineffective in preserving fairness, does not meet the constitutional mandate. *See Strickland*, 466 U.S. at 689.

Ordinarily, to prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *See id.* at 687; *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Russell*, 118 Idaho at 67, 794 P.2d at 656; *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). However, the second prong, demonstrating prejudice, is presumed where a defendant can demonstrate that a conflict of interest actually affected the adequacy of his or her representation. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980).

In *Strickland*, the United States Supreme Court clarified its holding in *Cuyler*, noting that ineffective assistance claims based on a conflict of interest warranted a presumption of prejudice that was "more limited" than in other contexts. *Strickland*, 466 U.S. at 692. The Court

concluded that, for claims based on a conflict of interest, there was not quite a “*per se* rule of prejudice” but, instead, that prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his or her lawyer’s performance. *Id.*, 466 U.S. at 692.

Rojas argues that an actual conflict of interest arose in his case that caused his trial attorney to advise Juarez not to testify on his behalf. Rojas asserts that his attorney advised Juarez not to testify on his behalf about instances of the victim’s dishonesty because his attorney thought Juarez’s testimony could be used against her later at her own trial. Rojas was accused of sexual abuse and lewd conduct with a minor for acts that occurred during a two-year period from May 2001 through April 2003. Juarez was charged with failing to report child abuse within twenty-four hours of the discovery of such conditions. Juarez’s defense at her trial was based on a phone call made by a neighbor to child protective services in August 2002 in which Juarez also spoke with the authorities. Essentially, Juarez’s defense appears to have been that she did contact the authorities within twenty-four hours of discovering the child abuse. Rojas argues that his attorney’s advice to Juarez that she not testify on his behalf was a strategy designed to protect Juarez from revealing any information that might indicate she was aware of the abuse before the phone call in August 2002 occurred. Therefore, Rojas contends that his attorney’s advice to Juarez that she not testify on his behalf was not in the best interests of his case but, rather, was to protect Juarez and a direct result of the conflict of interest.

In addition to demonstrating that there was an actual conflict of interest, a defendant must also demonstrate that the conflict actually affected the adequacy of his or her representation. *See Cuyler*, 446 U.S. at 349-50. Several federal appellate courts have described this as an adverse effect element, requiring a defendant to demonstrate that some plausible defense strategy or tactic might have been pursued but was not because of the conflict of interest. *See Perillo v. Johnson*, 79 F.3d 441, 449 (5th Cir. 1996) (holding that “to show adverse effect, a petitioner must demonstrate that some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest”); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993) (concluding the adverse effect inquiry requires a defendant to prove a viable alternative defense strategy and demonstrate his or her attorney did not pursue it because of a conflict); *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) (finding adverse effect “if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it

was inherently in conflict with his duties to others or to his own personal interests”); *United States v. Gambino*, 864 F.2d 1064, 1070-71 (3d Cir. 1988) (noting that “a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it”); *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985) (requiring a defendant to demonstrate that “the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests”). This Court has described this element of the claim as requiring a showing that “the conflict impaired counsel’s performance.” *Beasley v. State*, 126 Idaho 356, 363, 883 P.2d 714, 721 (Ct. App. 1994).

In this case, contrary to Rojas’s assertions, his trial attorney testified that he advised Juarez not to testify on Rojas’s behalf because it was not in Rojas’s best interests. At Rojas’s post-conviction hearing, his trial attorney testified as follows:

- Q. Did you tell [Juarez] not to testify in support of [Rojas]?
A. That it was not in [Rojas’s] best interest, so I did, yes.

In addition, Rojas’s trial attorney testified that he thought the idea of Juarez calling her daughter a liar on the stand was “fraught with somewhat potentially negative” consequences for both Rojas and Juarez. Rojas’s trial attorney also testified that issues and specific instances of the victim’s dishonesty were brought out at trial.

Even Juarez testified that her trial attorney informed her that she should not testify in Rojas’s case because her testimony would not be helpful to Rojas. At Rojas’s post-conviction hearing, Juarez testified on redirect examination as follows:

- Q. Following that, when you talked to [your attorney], did he inform you that it wouldn’t be in the best interest of your case to testify?
A. Not my case, [Rojas’s] case.

Rojas highlights several portions of his trial attorney’s testimony at his post-conviction hearing and asks this Court to read between the lines to reach the conclusion that his attorney’s advice to Juarez that she not testify on his behalf was given to protect Juarez, not because it was in Rojas’s best interest. Where both Rojas’s trial attorney and Juarez testified that the advice was given because it was not in Rojas’s best interest to have Juarez testify, and trial counsel explained that evidence of the victim’s honesty was produced at trial and offered a logical explanation of why Juarez’s testimony would not have been in Rojas’s best interest, we decline

Rojas's invitation to infer the opposite conclusion. Rojas's trial attorney did not advise Juarez not to testify because of the conflict. Therefore, any conflict--if one actually existed--did not adversely affect the representation Rojas received because his attorney's advice to Juarez was based on sound trial strategy and may have been the same even if the attorney was not representing both Rojas and Juarez.

When counsel's actions are within a wide range of professionally competent assistance and undertaken for tactical reasons, rather than because conflicting loyalties exist, a reviewing court may conclude that no actual conflict existed. *See generally Burger v. Kemp*, 483 U.S. 776 (1987). *See also* 3 W. LAFAVE ET AL., CRIMINAL PROCEDURE, § 11.9(d) at 940 (3d ed. 2007) (noting that "*Burger* suggests that a court may well start with an examination of what counsel did (or did not do) and why, for if it determines that the action challenged as adverse and reflecting a conflict was actually taken in the defendant's interest, then it should find that no actual conflict existed"). In *Burger*, the defendant filed a petition for habeas corpus claiming ineffective assistance of counsel based on a conflict of interest because two partners from the same firm worked together to represent coindictes. The Court noted that, because the coindictes received separate proceedings, there was a significantly reduced potential for a divergence in interests. *Burger*, 483 U.S. at 784. The Court began by evaluating what actions Burger's attorney had taken and the attorney's testimony concerning why those actions were taken. The Court, crediting the district court's evaluation of Burger's attorney's testimony, concluded that the attorney had conducted sufficient investigation and that his decisions had a sound strategic basis. *Id.* at 784-85. Therefore, the Court denied Burger's ineffective assistance of counsel claims.

In this case, Rojas and Juarez received separate trials so there was a significantly reduced potential for a divergence in interests. *See Burger*, 483 U.S. at 784. Furthermore, based on Rojas's trial attorney's testimony, we conclude that his attorney's advice to Juarez was shown to be professionally competent and given for a tactical reason, rather than because a conflict of interest existed. Therefore, it is irrelevant whether we follow the Supreme Court's approach in *Burger* and conclude that there was no actual conflict of interest, or conclude that any possible conflict did not adversely affect Rojas's representation. Rojas has failed to meet his burden of demonstrating that he received ineffective assistance of counsel because he has not shown that an actual conflict of interest adversely affected the representation he received.

IV.
CONCLUSION

Rojas has failed to demonstrate that an actual conflict of interest adversely affected the representation he received at trial. Therefore, the district court's order dismissing Rojas's application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**